(4)

No. 93-6497

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is federal statutory authority for staying a state execution and appointing counsel to assist a death sentenced inmate in federal habeas review if a petition has not been filed raising substantial grounds for relief and vesting the federal courts with jurisdiction?

2. Whether the Constitution requires that counsel be appointed to assist a death-sentenced inmate in state and federal habeas review?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of probable cause to appeal and a stay is attached to the petition as Appendix A. The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, is attached to the petition as Appendix B.

[1] For clarity, the petitioner is referred to as "McFarland" and the respondent as "the Director".

STATEMENT OF JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 2254. Nonetheless, because the courts below denied a certificate of probable cause to appeal, this case never was "in" the court of appeals for purposes of appeal under § 2254. As set forth *infra*, there is no jurisdiction pursuant to the All Writs Act, codified at 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McFarland bases his claims upon the Eighth and Fourteenth Amendments and 28 U.S.C. § 2251, 28 U.S.C. 1651(a), 28 U.S.C. § 2283, and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of McFarland pursuant to a judgment and sentence of the Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Texas

Code of Criminal Procedure, Article 37.071(b) (Vernon Supp. 1991).[2] Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. McFarland was represented on direct appeal by Jack V. Strickland and Michael Ware of Fort Worth, Texas. On September 23, 1992, the Court affirmed McFarland's conviction and sentence. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. *See* Appendix A to Respondent's Opposition to Application for Stay of Execution in the district court (Clerk's affidavit).

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[2] Pursuant to Article 37.071, McFarland's jury was required to answer the following special sentencing issues:

> Special Issue No. 1
>
> Was the conduct of the Defendant, Frank Basil McFarland, that caused the death of Terry Hokanson, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Special Issue No. 2
>
> Is there a probability that the Defendant, Frank Basil McFarland, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr. II: 436-37. "Tr" refers to the transcript of McFarland's trial, followed by the volume and page. "R" refers to the statement of facts of his trial, followed by the volume and page number.

Mr. Strickland evinced his intent to continue representing McFarland by filing on December 12, 1992, a motion to stay the mandate in the Court of Criminal Appeals to allow adequate time to file a certiorari petition. *See* Appendix B to Respondent's Opposition to Application for Stay of Execution in the district court (Strickland's Motion to Stay the Mandate). This was apparently Strickland's last appearance as counsel for McFarland. The motion was granted, and mandate was stayed until March 12, 1993. After receiving correspondence from the Center on March 11th and April 19th, McFarland wrote to Mr. Strickland. *See* Appendix C to Opposition to Application for Stay of Execution in the district court (TDCJ-ID-Outgoing Mail Log). Following that correspondence, Mr. Strickland no longer appeared as counsel of record.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). Over two months later, on August 16, 1993, Judge Leonard entered an order scheduling McFarland's execution for September 23, 1993. *See* Appendix D to Opposition to Application for a Stay of Execution in the district court (order setting execution and cover letter). By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland. *See* Appendix E to Respondent's Opposition to Application for Stay of Execution in the district court (letter and proposed order). The following day, the trial court conducted a hearing attended by Lynn Lamberty of the Center and representatives of the Tarrant County District Attorney's office. Lamberty asked the Court to withdraw McFarland's execution to allow the Center to find new counsel, and to allow newly recruited counsel to file a state habeas application "within 120 days after the notice of recruitment of counsel is filed with this Court." *Id.* (proposed

order). Judge Drago, sitting for Judge Leonard for purposes of the hearing only, denied the Center's request and ordered the modification of McFarland's execution to October 27, 1993. *See* Appendix F to Opposition to Application for Stay of Execution in the district court (cover letter, order modifying, and death warrant).

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland, and again asked the court to withdraw the execution date. *See* Appendix G to Opposition to Application for Stay of Execution in the district court (letter and proposed order). On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. *See* Appendix H to Opposition to Application for Stay of Execution in the district court. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. Appendix I to Opposition to Application for Stay of Execution in the district court (Affidavit of Tarrant County Clerk). The Court of Criminal Appeals denied the application for stay and motion on Friday, October 22, 1993. Appendix J to Opposition to Application for Stay of Execution in the district court (Order denying).

The same day, with the assistance of the Center, McFarland filed *pro se* a Motion for Stay of Execution and for Appointment of Counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by filing a federal habeas petition. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC) because the action did not represent an habeas proceeding. The United States Court of Appeals for the Fifth Circuit denied CPC

and a stay at approximately 6 p.m. the same day. This Court then granted McFarland's subsequent application for stay of execution pending disposition of the instant petition for certiorari review.

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. His application for CPC is still pending before the Court. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a).

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

> Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the two men. Appellant, Wilson, the victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.
>
> Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar

remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been

discovered. An autopsy revealed that the victim had been stabbed by at least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on

> the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

SUMMARY OF ARGUMENT

McFarland did not invoke the district court's jurisdiction by filing a petition. Under 28 U.S.C. §2251 a federal court may stay a state court proceeding only if a habeas action has been commenced by the filing of a petition and, thus, is pending before the court. A stay was not proper pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, which authorizes federal courts to preserve their jurisdiction, not to issue an injunction to preserve a hypothetical case or controversy. Similarly, the All Writs Act, 28 U.S.C. § 1651 (a) authorizes injunctions only in aid of the court's jurisdiction. 21 U.S.C. § 848 (q)(4) (B) addressed the question of appointment of counsel. It does not authorize an injunction of state court proceedings, but rather assumes the invocation of federal habeas jurisdiction under 28 U.S.C. § 2254.

The Constitution does not require that counsel be appointed to assist a death-sentenced inmate in state and federal habeas review. Further, McFarland's alleged lack of representation in the state court cannot be attributed to deficient

mechanisms or inadequate resources for obtaining representation in state habeas review. Rather his "*pro se*" status results from a fortuitous simultaneous inability by the Center to recruit counsel and a disinclination on the part of the Center to assume representation, despite the Center's having obtained the appellate records of McFarland's trial nine months and having corresponded with McFarland both before and after the denial of certiorari and before his first scheduled execution date.

ARGUMENT

I.

THERE IS NO FEDERAL STATUTORY AUTHORITY FOR STAYING A STATE EXECUTION AND APPOINTING COUNSEL TO ASSIST A DEATH-SENTENCED INMATE IN FEDERAL HABEAS REVIEW IF A PETITION HAS NOT BEEN FILED RAISING SUBSTANTIAL GROUNDS FOR RELIEF AND VESTING THE FEDERAL COURTS WITH JURISDICTION.

A. McFarland did not properly invoke the district court's habeas jurisdiction, and under these circumstances, a stay of execution is not authorized by federal law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides that a federal court may not enjoin state proceedings except in limited circumstances:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This statute is a Congressional command, fundamentally different from judicially created doctrines such as abstention. "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here

expressed in a clear-cut prohibition qualified only by special defined exceptions." *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 515-16 (1955). The Act is an "absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions," and the Supreme Court has expre .ly rejected the argument that the Act established a principle of comity rather than a binding rule. *Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281, 286 (1970). The Supreme Court unanimously reaffirmed the holdings of *Clothing Workers* and *Atlantic Coast Line* in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146-50 (1988). The Anti-Injunction Act authorizes federal district courts to preserve their jurisdiction; it does not authorize an injunction to preserve a hypothetical case or controversy. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality opinion) (the concurring Justices expressed no disagreement with the plurality's analysis of the "aid of jurisdiction" point, which was necessary to the judgment in which they concurred).

The district court could not have issued a stay in aid of its jurisdiction because McFarland did not invoke the district court's habeas jurisdiction by filing a petition. Consequently, the district court lacked jurisdiction to issue an order staying execution of a final and presumptively valid state judgment, and appellate jurisdiction is also lacking. Even where a petition is filed, the granting of a stay "should reflect the presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). A petitioner does not have a right to an automatic stay pending his first federal habeas corpus petition, regardless of the merits presented. *Autry v. Estelle*, 464 U.S. 1, 2 (1983).

In addition, no act of Congress expressly authorizes the grant of a stay of execution in the absence of a federal habeas petition. Indeed, the statutes

condition the stay of a state court order of execution on the pendency of a federal habeas action.

Federal Habeas Statute

A specific statute, 28 U.S.C. § 2251, authorizes stays of state court proceedings only by a judge or justice "before whom a habeas corpus proceeding is pending." A habeas action is "pending" under § 2251 when the petition is filed. In *In re Connaway*, 178 U.S. 421 (1900), the Supreme Court held that "[t]he filing of the complaint . . . is the commencement of the action and the jurisdiction of the court over the case." *Id.* at 427-28. Fed. R. Civ. P. 3 is indistinguishable from the statute that the Supreme Court construed in *Connaway*[3]: "A civil action is commenced by filing a complaint with the court."

The requirement that an action be pending is implicit in Fed. R. Civ. P. Rule 65(d). "Every order granting an injunction . . . is binding only upon the parties to the action . . ." and persons in privity with parties. If there is no action there can be no parties, and no one is bound by the injunction.

"Where such party [to be enjoined] is a defendant, jurisdiction over the defendant implies either voluntary appearance by him or effective service of process." 7 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE para. 65.03[3] at 65-27 and 65-28. The process to be served is the summons and complaint together in a regular civil action, Fed. R. Civ. P. 4(d), and is the petition in a habeas case. Rule 4, 28 U.S.C. fol. § 2254. Without service there is no jurisdiction, and again the person sought to be enjoined is not legally bound. Today, the Director is not a "person not before the court." He was not

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[3] When *Connaway* was decided, the federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 Moore § 1.02[1] at p. 1-5.

served with a habeas corpus petition or any other process that would make him a party to the action. No one had been made a party respondent or defendant, because no action had commenced.

All Writs Act

McFarland cannot invoke the All Writs Act, 28 U.S.C. § 1651(a), as a basis for obtaining a stay of execution. The Act authorizes injunctions only in aid of the court's jurisdiction. For the reasons discussed above, however, McFarland did not properly invoke the jurisdiction of the district court below. As such, there can be no stay "in aid of jurisdiction" under the All Writs Act.

Criminal Justice Act

McFarland also relies on a provision of the Criminal Justice Act, 21 U.S.C. § 848(q)(4)(B), to support his claim that the district court below was required to issue a stay of execution. According to McFarland, a stay of execution is a "necessary concomitant" to the statute's provision for appointment of counsel in federal habeas actions.

Section 848(q)(4)(B) addresses the question of appointment of counsel. It does not expressly authorize the injunction of state court proceedings, which is necessary to overcome the Anti-Injunction Act. Nor is section 848(q)(4)(B) a jurisdictional statute that even arguably might confer jurisdiction independent of the filing of a federal habeas petition. To the contrary, the provision quoted by McFarland makes clear that the statute *assumes* the invocation of federal habeas jurisdiction: "*In any post conviction proceeding* under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] services shall be entitled to the appointment of one or more attorneys. . . ."

In sum, the court below neither had jurisdiction of the subject matter nor jurisdiction over the person. The entry of a stay was not authorized by statute or necessary to preserve jurisdiction properly invoked.

B. The application for stay and counsel cannot be "deemed" to be a petition.

McFarland's stay application and motion for appointment of counsel, standing alone, were insufficient to invoke the district court's jurisdiction under 28 U.S.C. § 2254. McFarland has had nearly five months--since the June 6, 1993 denial of his certiorari petition--to prepare a habeas application.

In exhibits to McFarland's motion for stay and for counsel, the Center asserts a variety of reasons to explain its failure file a state habeas application in the trial court and a federal habeas petition in the district court.[4] Most prominent among them is the inability to timely locate counsel to represent the petitioner. The Center recruited Isaiah Gant to represent McFarland in the Supreme Court. Apparently it was known at the outset of the Supreme Court proceedings that Mr. Gant did not intend to further represent McFarland. At the very least, the fact that new counsel would be needed was known by the time certiorari was denied on June 6th. In fact, mail logs from the Texas Department of Criminal Justice-Institutional Division reflect that McFarland received correspondence from the

[4] The Center never asked the trial court to modify McFarland's execution date for a specified time to enable him to file a state habeas application. The Center's open-ended proposed order only asked that the date be withdrawn and that a habeas application would be filed "within 120 days after the notice of recruitment of counsel is filed with this Court." *See* Appendix E to Respondent's district court Opposition to Application for Stay of Execution (Proposed Order). Moreover, in telephone conversations with representatives of the Tarrant County District Attorney's office, the Center repeatedly was told that the State would not oppose a stay of execution if the Center or their recruited counsel would file a state habeas application. *See id.*, Appendix K (Affidavits of Assistant District Attorneys Edward Wilkinson, Charles Mallin, and Betty Marshall).

Center both before and after the denial of certiorari and *before* his initial execution date was scheduled.[5] Notwithstanding the Center's claim that it is nearly impossible to recruit counsel after an execution date is set, in this case it knew that McFarland would require representation well in advance of the trial court's initial order of August 16, 1993, setting his execution for September 23rd.[6]

Without the initial petition, there was nothing before the district court upon which to predicate a stay.

II.

THE CONSTITUTION DOES NOT REQUIRE THAT COUNSEL BE APPOINTED TO ASSIST A DEATH-SENTENCED INMATE IN STATE AND FEDERAL HABEAS REVIEW.

Relying on *Murray v. Giarratano*, 492 U.S. 1 (1989), McFarland argues that his federal constitutional right of access to the courts guaranteed by the Due Process and Equal Protection Clauses was infringed by the district court's and the Texas Court of Criminal Appeals' denials of his motions for appointment of counsel and application for stay of execution. Not only are "[s]tate collateral proceedings . . . not constitutionally required as an adjunct to state criminal proceedings," if a state provides for collateral review, due process does not secure the same procedural protections as those on direct appeal. *Murray v. Giarratano*, 492 U.S. at 10; *see Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *United*

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[5] McFarland received mail from the Center on March 11, 1993, April 19, 1993, and July 10, 1993. *See* Appendix C to Respondent's Opposition to Application for Stay of Execution in the district court.

[6] The Center has represented death-sentenced inmates in state habeas proceedings in the absence of a scheduled execution. For example, the Center currently is representing inmate Jonathan Nobles in state habeas corpus proceedings in Travis County although an execution date has not been set.

States v. McCollum, 426 U.S. 317, 322-28 (1976) (neither due process nor equal protection require that indigent petitioners under 28 U.S.C. § 2255 be given a trial transcript to aid their pursuit of collateral relief). In *Giarratano*, Chief Justice Renquist speaking for a plurality of the Court, concluded that neither the Eighth Amendment nor due process require a state to appoint counsel to assist death-sentenced inmates in state collateral review. 492 U.S. at 10.

McFarland relies on Justice Kennedy's concurrence and the dissent in *Giarratano* for the proposition that a failure to provide indigent death-sentenced inmates with appointed counsel in state and federal habeas review violates their constitutional right of access to the courts. The reliance on *Giarratano* is misplaced. In Texas, the initiation of state habeas proceedings by a death-sentenced inmate is triggered by the setting of an execution date. At that time, counsel is appointed by the trial court[7] or recruited by the Texas Resource Center either to assist the inmate in state habeas review. In his dissent in *Giarratano*, Justice Stevens noted that, of the thirty-seven States authorizing capital punishment, eighteen automatically provided indigent death row inmates with counsel to initiate their state habeas proceeding and thirteen, among these Texas, have governmentally funded resource centers to assist counsel in litigating capital cases. Representation is thus provided to Texas' death-sentenced inmates by either of the alternative methods approved by the dissent.

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[7] Article 1.051 (d) (3) of the Texas Code of Criminal Procedure provides as follows:

> (d) An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and post-conviction matters:
>
> (3) a habeas corpus proceeding if the court concludes that the interests of justice require representation;

This is not a case in which there is no mechanism in place to provide counsel to a death-sentenced inmate and, thus, does not raise the issue that McFarland argues was left open in *Giarratano*. McFarland's petition for certiorari review on direct appeal was filed on March 9, 1993, by Center-recruited counsel. Moreover, certiorari review was denied by the Court on June 6, 1993. The alleged inability of the Center to recruit counsel or itself provide representation to McFarland in state collateral review can, at best, only reflect the most abysmal lack of record keeping by the Center and a resulting failure to secure McFarland's easily anticipated need for representation. Alternatively, the alleged failure to recruit state habeas counsel must be understood by its consequences to be an attempt to manipulate the appearance of a "crisis in representation" when in fact none exists--a delay mechanism to the review process that should not be tolerated by the Court.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that McFarland's petition for writ of certiorari be denied.

Respectfully submitted,

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CLERK OF THE COURT

AREA CODE 202
479-3011

October 27, 1993

Ms. Mandy Welch
Texas Resource Center
3223 Smith Street, #215
Houston, TX 77006

Re: Frank B. McFarland
v. James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division
No. 93-6497 (Application No. A-375)

Dear Ms. Welch:

The Court today entered the enclosed order in the above-entitled case.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Cynthia J. Rapp
Assistant Clerk

Enc.
cc: Dan Morales
Clerk, U.S. Court of Appeals for the Fifth Circuit (Your No. 93-1954)

ORDER LIST

WEDNESDAY, OCTOBER 27, 1993

ORDER IN PENDING CASE

93-6497
(A-375) MCFARLAND, FRANK B. V. COLLINS, DIR., TEXAS DCJ

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.